DePaul Law Review

Volume 20
Issue 4 *1971*

Article 8

Torts - Negligent Infliction of Mental Distress - Maine and Michigan Abolish the "Impact Rule"

Ronald G. Silbert

TORTS—NEGLIGENT INFLICTION OF MENTAL DISTRESS—MAINE AND MICHIGAN ABOLISH THE "IMPACT RULE"

On July 16, 1963, at approximately 10:00 P.M. Charles LaCroix was driving down the highway, when his car suddenly veered across the road, traveled 63 feet in the air, 209 feet from the highway, and sheared off a utility pole. As a result, a number of high voltage lines snapped, coming in contact with the power lines leading into the house of Leonard H. Daley, causing a great electrical explosion, considerable property damage, and allegedly engendering emotional disturbance and nervousness in Daley's wife and child.[1]

The trial court directed a verdict against Estelle and Timothy Daley as to their claim for emotional disturbance, and the court of appeals[2] affirmed the verdict on the ground that Michigan law does not allow recovery for emotional disturbance resulting from negligence unless there is a physical impact[3] inflicted upon the person contemporaneously with the fright or nervous shock. The Supreme Court of Michigan, concluding that the absence of a contemporaneous physical impact would no longer be an automatic bar to recovery in Michigan, reversed the court of appeals, and remanded the case for a new trial, so that Estelle and Timothy Daley would be given an opportunity to show the causal connection between their emotional disturbance and the negligence of LaCroix. *Daley v. LaCroix*, — Mich. —, 179 N.W. 2d 390 (1970).

On December 23, 1966, Malcolm H. Wallace entered a store known as Lindley's in Canton, Maine, and as was the custom in this store, Wallace removed a bottle of Coca-Cola from a non coin-operated cooler. He opened the bottle, and upon drinking from it, felt a foreign object touch his tongue. This object was discovered to be an unpackaged prophylactic. Wallace returned home, pondered this experience and became nauseous. Wallace continued to be ill for some time, resulting in his absence from work.

1. The explosion and flashes of bluish light caused the Daleys to think that an atomic bomb had been dropped. Brief of Appellant at 4, Daley v. LaCroix, — Mich. —, 179 N.W.2d 390 (1970).

2. 13 Mich. App. 26, 163 N.W.2d 666 (1968).

3. "Impact" can be a physical injury, or a mild blow, and as explained in one decision, the "impact rule" can be satisfied by any slight contact, even if no physical injury is manifested. Zelinsky v. Chimics, 196 Pa. Super. 312, 317, 175 A.2d 351, 353 (1961).

Finding the bottle to be purchased from Coca-Cola, and the foreign object to be present at the time of purchase, the jury rendered a verdict for Wallace in the sum of two thousand dollars. On appeal, the Supreme Judicial Court of Maine disagreed with the contention that there was no compensable physical injury under Maine law. Instead, the court held there can be recovery for foreseeable mental and emotional suffering proximately caused by the negligence of another even though there is no discernable trauma from external causes—thus abolishing the "impact rule" in Maine. *Wallace v. Coca-Cola Bottling Plants Inc.*, — Me. —, 269 A.2d 117 (1970).

The significance of the *Wallace* and *Daley* decisions is two-fold.[4] First, the cases abolish the requirement that there must be a contemporaneous physical impact in order to recover for mental distress which has been negligently inflicted. In this respect, these jurisdictions have joined the majority position and have brought the "impact rule" two steps closer to its imminent extinction, while at the same time augmenting the uniform application of tort liability standards. Second, these decisions represent the adoption in Maine and Michigan of a more flexible and progressive liability formula for the negligent infliction of mental distress. The purpose of this note is to examine the basis of the "impact rule," focusing in particular on why it is not a valid limitation on recovery, and to analyze the contribution of the *Wallace* and *Daley* decisions to the development of a rational liability formula in the area of negligently inflicted mental distress.

Determining the liability for invasions of mental tranquillity has been a perplexing problem for both the courts of England and the United States. Originally, the courts considered whether there should be any liability for the negligent infliction of mental distress.[5] Later, the courts progressed to the issue of the limits of liability.[6] In the 1888 English case of *Victorian Railways Commissioners v. Coultas*,[7] the court faced this problem, and did not allow the plaintiff to recover for the damage to her nervous system which resulted from her fear of the defendant's oncoming

4. The decision in the Wallace v. Coca-Cola Bottling Plants, Inc., is also significant in that it makes proof of tampering with the bottles by a third party an affirmative defense, thus putting the burden of proof on the defendant. This aspect of the decision will not be dealt with in this casenote. For a discussion of the topic *see* Annot., 52 A.L.R.2d 117 (1957); 2 HARPER AND JAMES, THE LAW OF TORTS § 28.14 at 1566 (1956).

5. *See* Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944).

6. *Id.*

7. L.R. 13 App. Cas. 222 (P.C. 1888).

train. The court characterized the damages as too remote, but did not decide that impact was an essential requirement.[8] Yet, this case has been awarded the "dubious distinction" of being the "leading case for the proposition that there can be no recovery for the physical results of mental anguish without impact . . . ."[9] The *Coultas* decision, criticized and eroded by subsequent cases,[10] was overruled in England just thirteen years later by the decision of *Dulieu v. White & Sons*,[11] where the court allowed the plaintiff to recover for the fright caused by the defendant's negligent driving of a horse van, which caused the plaintiff to become ill and give premature birth to an idiot child. The court reasoned:

> That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be a contention both unreasonable and contrary to the weight of authority.[12]

Thus, by 1901, the English Courts settled upon a rule allowing recovery for the physical consequences of negligently inflicted emotional distress.

Unlike the English, the American courts struggled with divergent formulas for the emotional distress cases. The early majority was comprised of states requiring a contemporaneous physical impact.[13] However, a strong and ever-increasing minority existed, which applied the principles of foreseeability and proximate causation to determine the liability for causing mental distress.[14] The courts which denied liability without a contemporaneous physical impact argued that no precedent existed for allowing recovery for the physical effects of fright; that the effects of fright

---

8. The court explained that ". . . the first question whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants." *Id.* at 226.

9. Daley v. LaCroix, *supra* note 1, at —, 179 N.W.2d at 393, n.6, citing Annot., 64 A.L.R.2d 100, 135 (1959).

10. *See* Wilkinson v. Downtown, [1897] 2 Q.B. 57; Pugh v. London, B. & S.C. Ry., [1896] 2 Q.B. 248 (Dictum); Bell v. Great Northern Ry., [1890] 26 L.R. Ir. 428 (Ireland); Smith, *supra* note 5, at 201.

11. [1901] 2 K.B. 669.

12. *Id.* at 673-74.

13. *See, e.g.*, St. Louis, I.M. & S. R.R., v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901); Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Kalen v. Terre Haute & I. R.R., 18 Ind. App. 202, 47 N.E. 694 (1897); McArdle v. Peck Dry Goods Co., 191 Mo. App. 263, 177 S.W. 1095 (1915); and Miller v. Baltimore & Ohio S. W. R.R., 78 Ohio St. 309, 85 N.E. 499 (1908).

14. *See, e.g.*, Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Lindley v. Knowlton, 179 Cal. 298, 176 P. 440 (1918); Goddard v. Watters, 14 Ga. App. 722, 82 S.E. 304 (1914); Green v. Shoemaker, 111 Md. 69, 73 A. 688 (1909); Purcell v. St. Paul City R.R., 48 Minn. 134, 50 N.W. 1034 (1892); Mack v. South Bound R.R., 52 S.C. 323, 29 S.E. 905 (1898); and Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).

caused by a negligent act were remote and not a proximate result thereof; finally, that the existence of the emotional distress was too difficult to prove, and allowing recovery would create a flood of litigation with many fraudulent claims. An analysis of these arguments reveals they are based more upon administrative expediency than upon fundamental concepts of tort liability.

Originally, courts used the stare decisis principle to deny liability because no precedent existed,[15] then later used it to deny liability because the previous courts had required impact.[16] This type of reasoning leads to a liability formula based purely on experience, not logic.[17]

The counter-argument to the stare decisis basis of the "impact rule" is two-fold. First, is the rationale that a court is following the finest common-law tradition when it alters prior case law in the interest of justice.[18] Second, when many of the cases were decided, there were no precedents for a denial of liability, and existing principles allowed recovery for damages which were the proximate result of another's negligence. As the court explained in *Chiuchiolo v. New England Wholesale Tailors*:[19]

> [I]f such injury results proximately although through the intermediate agency of fright, it follows that the absence of reported cases does not show that there is no liability therefor. If general legal principles impose such liability, the denial of liability must be an exception to the application of the principles.[20]

There appears to be little merit in the stare decisis argument.

Apparently in an effort to refute the argument that liability for the

---

15. *See, e.g.*, Ward v. West Jersey & Seashore R.R., 65 N.J.L. 383, 47 A. 561 (1900); Lehman v. Brooklyn City R.R., 47 Hun. 355 (N.Y. 1888); Ewing v. Pittsburgh, C.C. & St. L. R.R., 147 Pa. St. 40, 23 A. 340 (1892), *overruled*, Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Victorian Ry's Comm'rs v. Coultas, *supra* note 7.

16. *See, e.g.*, Herman v. Eastern Airlines, 149 F. Supp. 417 (E.D.N.Y. 1957) (applying Virginia law); Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929).

17. Ironically, the statement that "[t]he life of the law has not been logic: it has been [human] experience," HOLMES, THE COMMON LAW, 1 (1881), has been used to both support and attack the existence of the "impact rule." In Niederman v. Brodsky, *supra* note 15, at 416, 261 A.2d at 90 (dissent), it was used to support the continued adherence to the rule, while in Daley v. LaCroix, *supra* note 1, at —, 179 N.W.2d at 394, n.8, it was used to criticize the validity of the "impact rule."

18. Battalla v. State of New York, 10 N.Y.2d 237, 239, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 36 (1961), citing Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951) [Noted in Annot., 27 A.L.R.2d 1250 (1953)]; Hill v. Kimball, *supra* note 14, at 215, 13 S.W. at 59.

19. 84 N.H. 329, 150 A. 540 (1930).

20. *Id.* at 333, 150 A. at 542. *Accord*, Battalla v. State, *supra* note 18, at 240, 176 N.E.2d at 730, 219 N.Y.S.2d at 36.

negligent infliction of emotional distress could be based on existing principles of foreseeability and proximate causation, the courts which required "impact" argued that physical illness was not a natural consequence of fright, and the risk of injury in such a manner was too remote.[21] One of the leading American cases requiring "impact," *Mitchell v. Rochester Ry.*,[22] involved a woman who was frightened by an oncoming horse car of the defendant railway. The horse car came so close to the plaintiff that she stood between the horses' heads when it finally stopped. According to medical testimony, the fright resulted in a miscarriage and subsequent illness, but the court held the plaintiff could not recover for injuries resulting from fright since there was no immediate personal injury.[23] Among the reasons[24] given for this decision is the explanation that the damages were too remote.[25]

The contention that fright resulting in physical illness cannot be the proximate result of negligence has been rejected on both legal and medical bases. Early decisions allowing recovery for the negligent infliction of mental distress recognized that fright alone could proximately cause physical injuries.[26] This legal recognition is supported by medical evidence that emotional distress can and does cause physical injury.[27]

---

21. *See, e.g.*, Kramer v. Ricksmeier, 159 Iowa 48, 50, 139 N.W. 1091 (1913); Reed v. Ford, 129 Ky. 471, 475, 112 S.W. 600, 601 (1908); Spade v. Lynn & Boston R.R., *infra* note 28, at 289, 47 N.E. at 89; Ward v. West Jersey and Seashore R.R., *supra* note 15, at 385, 47 A. at 562.

22. 151 N.Y. 107, 45 N.E. 354 (1896), *overruled*, Battalla v. State of New York, *supra* note 18.

23. *Id.* at 109, 45 N.E. at 354.

24. One of the notorious arguments of the court was "[i]f it be admitted that no recovery can be had for fright occasioned by the negligence of another it is somewhat difficult to understand how a defendant would be liable for its consequences." *Id.* Although this reasoning was followed by such cases as St. Louis, I.M. & S. R.R. v. Bragg, *supra* note 13, at 405, 64 S.W. at 227; Mahoney v. Dankwart, 108 Iowa 321, 324, 79 N.W. 134, 135 (1899); and Kentucky Traction and Terminal Co. v. Roman's Guardian, *supra* note 16, at 292, 23 S.W.2d at 275; the logic of this argument has been characterized as a *non sequitur*—unlike mere fright, when the damages are physical and objective, they can be measured. *See* Alabama Fuel & Iron Co. v. Baladoni, *supra* note 14, at 320, 73 So. at 205; Battalla v. State of New York, *supra* note 18 at 240, 176 N.E.2d at 730, 219 N.Y.S.2d at 37; McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 26 (1949); Smith, *supra* note 5, at 211.

25. Mitchell v. Rochester Ry., *supra* note 22, at 110, 45 N.E. at 355. The argument has some validity with respect to miscarriages. In a study of 1,000 non-criminal abortions, only one could be attributed to external trauma or emotional distress. 3 LAWYERS' MEDICAL CYCLOPEDIA § 37.16 (1960).

26. *See, e.g.*, Purcell v. St. Paul City R.R., *supra* note 14, at 137, 50 N.W. at 1034; Hill v. Kimball, *supra* note 14, at 215, 13 S.W. at 59.

27. *See* CANON, BODILY CHANGES IN PAIN, HUNGER, FEAR AND RAGE (2nd ed. 1953); DUNBAR, EMOTIONS AND BODILY CHANGES (4th ed. 1954); 3 LAWYERS' MEDI-

The lack of proximate causation and remoteness arguments are further weakened by one of the leading "impact" cases, *Spade v. Lynn & Boston R.R.*,[28] which has recognized that:

A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects.[29]

While recognizing the causal relationship, the Massachusetts court justified the contemporaneous physical injury requirement before it would allow recovery for the negligent infliction of emotional distress, on the basis of a "public policy" argument.[30] This argument consists of the sub-arguments that the causal connection is too difficult to establish;[31] therefore to allow recovery without the "impact" limitation would lead to fraudulent claims and a flood of litigation.[32] This has been recognized as the most viable justification for the "impact rule." For example, in *Chiuchiolo*, Justice Allen recognized that:

The only possibly adequate reason suggested for the exception to the rule of liability is that of expediency, and the argument is made that in the long run justice will be promoted with rather than without the exception because otherwise "this would open a wide door for unjust claims, which could not successfully be met."[33]

Despite this recognition of the "public policy" argument, it still has been subjected to effective and persuasive criticism.

The explanations of why "public policy" does not provide a rational

---

CAL CYCLOPEDIA § 19.6 (rev. ed. 1970). Smith, *supra* note 5, at 215-26, lists clinical disorders probably related to emotional stimulation, and concludes by saying that "[o]ur purpose in the foregoing discussion has been to show the scientific error in assuming that psychic stimuli cannot cause injury . . . , on the other hand . . . we do not say that injury is an invariable or even a frequent consequence." *Id.* at 225.

28. 168 Mass. 285, 47 N.E. 88 (1897).

29. *Id.* at 288, 47 N.E. at 89.

30. *Id.*

31. *Id.* at 290, 47 N.E. at 89. *Accord*, Kramer v. Ricksmeier, *supra* note 21, at 50, 139 N.W. at 1091; Mitchell v. Rochester Ry., *supra* note 22, at 110, 45 N.E. at 354-55; Bosley v. Andrews, 393 Pa. 161, 168-69, 142 A.2d 263, 267 (1958), *overruled*, Niederman v. Brodsky, *supra* note 15.

32. Spade v. Lynn Boston R.R., *supra* note 28, at 290, 47 N.E. at 89. *Accord*, Ward v. West Jersey & Seashore R.R., *supra* note 15, at 386, 47 A. at 562; Mitchell v. Rochester Ry., *supra* note 22, at 110, 45 N.E. at 355.

33. Chiuchiolo v. New England Wholesale Tailors, *supra* note 19, at 334, 150 A. at 543. The public policy argument is supported to some extent by the observation that ". . . lasting damage does not occur in "normal" individuals as a result of emotional shock, however severe." Havard, *Reasonable Foresight of Nervous Shock*, 19 MOD. L. REV. 478, 482 (1956). It has also been noted in an exhaustive study of the early nervous shock cases, that in a majority of these cases the plaintiff received

basis for the existence of the impact rule can be categorized into four basic arguments. First, the "public policy" argument has been refuted by the realization that the increasing sophistication of medical knowledge has reduced the difficulty of tracing with certainty the connection between the negligence, fright, and resulting injury.[34] Second, it has been properly reasoned that it is no more difficult to assess the damage for mental distress without "impact," then it is to assess the damage for mental distress with "impact" or when mental distress is tacked on as a parasitic damage.[35] Third, it is exhorted that protection against fradulent claims is contained within our legal system of expert witnesses, juries, and the safeguards of evidentiary standards.[36] Fourth, it has been properly noted that public policy requires courts to find ways to solve problems, not expedient ways to avoid them.[37] Courts should not deny recovery for honest claims because some dishonest ones might prevail.[38]

---

an undeserved verdict because of the difficulty of proof. Smith, *supra* note 5, at 205. However, it must be noted that Mr. Smith did not regard this as a justification of the "impact rule," but as a reason to achieve better standards of proof. *Id.* at 306.

34. Orlo v. Connecticut Co., 128 Conn. 231, 236, 21 A.2d 402, 404 (1941); Robb v. Pennsylvania R.R., 210 A.2d 709, 712 (Del. 1965); Wallace v. Coca-Cola Bottling Plants, Inc., — Me. —, —, 269 A.2d 117, 121 (1970), *overruling* Herrick v. Evening Express Pub. Co., 120 Me. 138, 113 A. 16 (1921) [Noted in Annot., 23 A.L.R. 358 (1923)]; Daley v. LaCroix, *supra* note 1, at —, 179 N.W.2d at 395; Niederman v. Brodsky, *supra* note 15, at 405, 261 A.2d at 86. It has been explained that the "[p]resence or absence of impact is not of much consequence in determining the merits of a claim for injury through psychic stimuli." Smith, *supra* note 5, at 299.

35. *See, e.g.*, Orlo v. Connecticut Co., *supra* note 34, at 235, 21 A.2d at 404 (noting that mental suffering has long been a permissible element of damages. *Id.* at 236, 21 A.2d at 404); Chiuchiolo v. New England Wholesale Tailors, *supra* note 19, at 334, 150 A. at 543; Battalla v. State of New York, *supra* note 18, at 247, 219 N.Y.S. 2d at 37, 176 N.E.2d at 731; Niederman v. Brodsky, *supra* note 15, at 409, 261 A.2d at 88; Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 410, 234 A.2d 656, 659 (1967), *citing* Orlo v. Connecticut Co., *supra* note 34.

36. *See, e.g.*, Robb v. Pennsylvania R.R., *supra* note 34, at 714; Falzone v. Busch, 45 N.J. 559, 567, 214 A.2d 12, 16 (1965); Battalla v. State of New York, *supra* note 18, at 242, 176 N.E. 2d at 732, 219 N.Y.S. 2d at 38; Niederman v. Brodsky, *supra* note 15, at 409, 261 A.2d at 88; Lambert, *Tort Liability for Psychic Injuries*, 41 BOSTON U.L. REV. 584, 591 (1961). The logic of this and other counter-arguments to the "impact rule" led the Law Institute to delete the following caveat from the 1934 RESTATEMENT OF TORTS: "The Institute expresses no opinion that the unreliability of the testimony necessary to establish the causal relation between the actor's negligence and the other's illness or bodily harm may not make it proper for the court of a particular jurisdiction to refuse, as a matter of administrative policy, to hold the actor liable for harm to another which was brought about in the manner stated in this Subsection." RESTATEMENT (SECOND) OF TORTS § 436(2) (1934), deleted in, RESTATEMENT (SECOND) OF TORTS § 436(2) (1948 Supp.).

37. Robb v. Pennsylvania R.R., *supra* note 34, at 714.

38. Chiuchiolo v. New England Wholesale Tailors, *supra* note 19, at 335, 150 A. at 543.

The "flood of litigation" basis for the impact rule is grounded in the belief that if the impact rule were eliminated ". . . our Courts would be swamped by a virtual avalanche of cases for damages for many situations and cases hitherto unrecoverable . . . ."[39] However, apart from the fact that this "flood" has not occurred,[40] this argument has been persuasively rebutted by the admonition that an " . . . increase should not be determinative or relevant to the availability of a judicial forum for the adjudication of impartial individual rights."[41]

DEVELOPMENT OF A RATIONAL LIABILITY FORMULA

The debate over the merits of the impact rule exemplifies the struggle of the American courts to develop a rational liability formula for the negligent infliction of mental distress. This struggle has been complicated by the plethora of standards and formulas for recovery in the related areas of mental distress litigation.

The problems involved are illustrated by the different requirements needed to determine liability for an intentional or willful act as compared with merely a negligent one. In its present state of development,[42] the law on intentional infliction of mental distress allows recovery without a physical impact, often without a consequential physical injury.[43] Even

39. Knaub v. Gotwalt, 422 Pa. 267, 271, 220 A.2d 646, 647 (1966), *overruled,* Niederman v. Brodsky, *supra* note 15.

40. See Okrina v. Midwestern Corp., 282 Minn. 400, 405, 165 N.W. 2d. 259, 263 (1969); Gulf, C. & S.F. Ry. v. Hayter, 93 Tex. 239, 242, 54 S.W. 944, 945 (1900). In 1936, it was noted that the heaviest volume of litigation was in the states requiring "impact" because of the extensive exceptions constructed by the courts of such states. [1936] N.Y. LAW REVISION COMMISSION, ACT, RECOMMENDATION, AND STUDY RELATING TO LIABILITY FOR INJURIES RESULTING FROM FRIGHT OR SHOCK 375, 421.

41. Niederman v. Brodsky, *supra* note 15, at 412, 261 A.2d at 89. *See* Prosser, *Intentional Infliction of Mental Suffering: A New Tort,* 37 MICH. L. REV. 874, 877 (1939).

42. For a history of the development of the law on intentional infliction of mental distress, *see* Goodrich, *Emotional Disturbance as Legal Damage,* 20 MICH. L. REV. 497 (1922); Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033 (1936); Prosser, *supra* note 41; Note, *Intentional Infliction of Mental Suffering: A New Tort in Illinois,* 11 DEPAUL L. REV. 151 (1961).

43. *See, e.g.,* Cohen v. Lion Products Co., 177 F. Supp. 486 (D.C. Mass. 1959); Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954); Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Fraser v. Blue Cross An. Hosp., 39 Hawaii 370 (1952); Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934) [Noted in Annot., 91 A.L.R. 1491 (1934)]; RESTATEMENT (SECOND) OF TORTS § 46 (1965). *See generally* Annot., 64 A.L.R.2d 100, 120 (1959); PROSSER, THE LAW OF TORTS § 11 (3d ed. 1964).

the jurisdictions which require "impact" for the negligent infliction of mental distress dispense with the requirement when the defendant acts intentionally or willfully.[44] The differing prerequisites for recovery can make the determination of the nature of the defendant's conduct critical.[45]

Similarly, "impact" and physical consequences are not determinants of liability for the *sui generis* cases concerning the negligent transmission of a telegraph message concerning death or illness,[46] and the mishandling of corpses.[47] The minority with respect to the telegraph cases allows recovery for emotional distress, alone, and of course does not require physical impact. This is true in several states which ordinarily require impact for the negligent infliction of mental distress.[48]

Although the courts requiring a contemporaneous physical injury or impact have argued that the damage from mental disturbance is too difficult to measure, this objection has not prevented them from assessing the value for mental distress as part of the damage of a physical injury.[49] The

44. *See, e.g.*, Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 (1920) [Noted in Annot., 11 A.L.R. 1115 (1921)]; Knierim v. Izzo, *supra* note 43; Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961); Moore v. Jefferson Hospital, 208 Va. 438, 158 S.E.2d 124 (1967).

45. *Compare* Savage v. Boies, *supra* note 43, *with* Herrick v. Evening Express Pub. Co., *supra* note 34.

46. *See generally* 1 HARPER AND JAMES, THE LAW OF TORTS § 9.3 at 672-73 (1956); PROSSER, *supra* note 43, at 348-49. For a collection of cases, *see* RESTATEMENT (SECOND) OF TORTS § 436 A (Appendix 1966).

47. *See, e.g.*, St. Louis S.W. Ry. v. White, 192 Ark. 350, 91 S.W.2d 277 (1936); Carey v. Lima, Salmon & Tully Mortuary, 168 Cal. App.2d 42, 335 P.2d 181 (1959); Aetna Life Ins. Co. v. Burton, 104 Ind. App. 576, 12 N.E.2d 360 (1938); Louisville & N.R.R. v. Hull, 113 Ky. 561, 68 S.W. 433 (1902); Blanchard v. Brawley, 75 So.2d 891 (La. App. 1954); Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118 (1970); *See generally* Annot., 17 A.L.R.2d 770 (1951); 22 AM. JUR. 2d *Dead Bodies* § 43 (1965); 25A C.J.S. *Dead Bodies* § 8(5) (1966).

48. Mackay Tel. & Cable Co. v. Vaughan, 111 Ark. 504, 163 S.W. 158 (1914) (statute authorizing recovery); Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930) (statute authorizing recovery); Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895); Cumberland Tel. & Tel. Co. v. Quigley, 129 Ky. 788, 112 S.W. 897 (1908). *Contra*, Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N.E. 674 (1901); Western Union Tel. Co. v. Rogers, 68 Miss. 748, 9 So. 823 (1891); Connell v. Western Union Tel. Co., 116 Mo. 34, 22 S.W. 345 (1893).

49. *See, e.g.*, Chicago, R.I. & P. Ry. v. Caple, 207 Ark. 52, 58, 179 S.W.2d 151, 154 (1944); Horan v. Klein's-Sheridan, Inc., 62 Ill. App. 2d 455, 460, 211 N.E.2d 116 (1965) [Noted in Annot., 11 A.L.R.3d 365 (1967)]; New York, C. & St. L. R.R. v. Henderson, 237 Ind. 456, 477, 146 N.E.2d 531, 543 (1957); Gilman v. Metropolitan Transit Authority, 345 Mass. 202, 207, 186 N.E.2d 454, 457 (1962). *See generally* 25 C.J.S. *Damages* § 65 (1966); PROSSER, *supra* note 43, at 349-50. For a discussion of how damages for mental distress are "tacked on" to an invasion of the right of privacy, *see* McNiece, *supra* note 24, at 63; Note, *The Right to Mental Security*, 16 U. FLA. L. REV. 540, 548 (1964).

existence of the physical injury serves as a guarantee that the mental distress is not feigned,[50] and is probably the underlying basis of the impact rule. However, the impact rule has been applied in such a manner as to increase the problem of ascertaining the liability for negligent infliction of mental distress.

The courts which require impact have often circumvented its alleged purpose by finding the slightest impact a satisfactory fulfillment of the rule. It has been noted that once "[t]he magic formula 'impact' is pronounced the door opens to the full joy of a complete recovery."[51] An illustration of how the impact rule is "stretched" is found in the case of *Homans v. Boston Elevated Railway*,[52] where the plaintiff was thrown against a seat in one of the defendant's cars as a result of a collision occasioned by the defendant's negligence. The plaintiff was allowed to recover for mental suffering of a hysterical nature, without the necessity of showing that the battery was related to the mental distress.[53] In numerous other situations, occurrences, such as the inhalation of smoke,[54] have satisfied the impact rule despite the fact this slight physical contact often has no relation to the cause of the emotional distress.[55]

The impact rule has also been satisfied when as a direct result of defendant's negligence, the plaintiff's fright results in a physical injury. In *Comstock v. Wilson*,[56] the defendant negligently bumped the plaintiff's automobile. The plaintiff stepped out of the automobile, fainted, and fractured her skull as a result. The plaintiff was allowed to recover in spite of the fact that she fainted because of excitement over the minor accident, and not because of any fright from the impact itself.[57] This type of case is

50. *See* Orlo v. Connecticut Co., *supra* note 34, at 239, 21 A.2d at 405; PROSSER, *supra* note 43, at 350.

51. Goodrich, *supra* note 42, at 504.

52. 180 Mass. 456, 62 N.E. 737 (1902).

53. *Id.* at 458, 62 N.E. at 737. *Accord*, Petition of United States, 418 F.2d 264, 268 (1st Cir. 1969).

54. Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).

55. *See, e.g.*, Arkansas Motor Coaches Ltd. v. Whitlock, 199 Ark. 820, 136 S.W.2d 184 (1940) (constructive physical injury); Boston v. Chesapeake & Ohio R.R., 223 Ind. 425, 61 N.E.2d 326 (1945) (trivial jolt); Kentucky Traction & Terminal Co. v. Roman's Guardian, *supra* note 16 (slight burn); Kisiel v. Holyoke Street Ry., 240 Mass. 29, 132 N.E. 622 (1921) (slight jar); Porter v. Delaware, L. & W. R.R., 73 N.J.L. 405, 63 A. 860 (1906) (dust in the eye); Annot., 64 A.L.R.2d 100, 138-43 (1959); PROSSER, *supra* note 43, at 350-51; Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILLANOVA L. REV. 232, 234 (1962); McNiece, *supra* note 24, at 51-58; Smith, *supra* note 5, at 300. *But see* Sullivan v. H.P. Hood & Sons, Inc., 341 Mass. 216, 168 N.E.2d 80 (1960).

56. 257 N.Y. 231, 177 N.E. 431 (1931).

57. *See* Smith, *supra* note 5, at 243-44 n.161.

known as "the injury from without"[58] situation, and is another example of the problems involved in determining liability for invasion of mental tranquillity.

In view of the persuasive arguments for the abolition of the impact rule, and its strained application, it is not surprising that the number of jurisdictions which still adhere to it have diminished.[59] Of the states which have ruled on the issue, thirty do not require a contemporaneous physical impact to recover for the negligent infliction of emotional distress.[60] While Illinois can still be classified as a supporter of the impact rule,[61] in a recent decision[62] the Illinois Appellate Court recognized a strong argument for permitting recovery for negligently inflicted mental suffering without physical impact. However, the court declined to rule on the issue, since the plaintiff failed to prove the facts upon which she predicated her mental suffering.[63] It is likely that given the appropriate circumstances, Illinois will discard its impact rule. Recognition of the majority rule has also occurred in Florida,[64] and Mississippi,[65] indicating

58. *See* Freedman v. Eastern Mass. St. Ry. Co., 299 Mass. 246, 12 N.E.2d 739 (1938); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914); Potere v. City of Philadelphia, 380 Pa. 581, 112 A.2d 100 (1955); McNiece, *supra* note 24, at 44; Smith, *supra* note 5, at 317. *But see* Bosley v. Andrews, *supra* note 31.

59. *Arkansas*: St. Louis, I.M. & S. R.R. v. Bragg, *supra* note 13; *Florida*: Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950); *Illinois*: West Chicago St. R.R. Co. v. Liebig, 79 Ill. App. 567 (1899); *Indiana*: Boston v. Chesapeake & O. R.R., *supra* note 55; *Iowa*: Kramer v. Ricksmeier, *supra* note 21; *Kentucky*: Kentucky Traction & Terminal Co. v. Roman's Guardian, *supra* note 16; *Massachusetts*: Spade v. Lynn & Boston R.R., *supra* note 28; *Missouri*: McCardle v. George B. Peck Dry Goods Co., *supra* note 13; *Utah*: Samms v. Eccles, *supra* note 44 (dictum); *Virginia*: *See* Herman v. Eastern Airlines, *supra* note 16; *but see* Penick v. Mirro, 189 F. Supp. 947 (E.D. Va. 1960). The District of Columbia can be included within the jurisdictions requiring "impact" although its requirement is not absolute. *See* Perry v. Capital Traction Co., 32 F.2d 938 (D.C. Cir. 1929), *cert. denied*, 280 U.S. 577 (1929).

60. *See* Appendix *infra*.

61. Braun v. Craven, *supra* note 13; West Chicago St. R.R. v. Liebig, *supra* note 59. *See generally* Corey v. Hiberly, 346 F.2d 368, 370 (7th Cir. 1965). *But see* Knierim v. Izzo, *supra* note 43 where many of the justifications for the "impact rule" are attacked.

62. Halden v. Kayser Roth Corp., 92 Ill. App. 2d 240, 235 N.E.2d 426 (1968) (dictum).

63. *Id.* at 245, 235 N.E.2d at 429.

64. Hollie v. Radcliff, 200 So. 2d 616, 618 (Fla. App. 1967), wherein the court explained that: ". . . we must recognize that there has been a perceptible trend in this and other jurisdictions toward a relaxing of the said [impact] rule. In the case at bar, however, it is unnecessary for us to determine whether the trend in Florida to relax the rule has gone to the extent that damages are recoverable for mental injuries in the absence of an impact . . . there was impact sufficient to satisfy the 'impact rule.'"

65. Lyons v. Zale Jewelry Co., 246 Miss. 139, 149, 150 So. 2d 154, 158 (1963)

that they may do likewise.

DETERMINING THE SCOPE OF LIABILITY

An examination of the liability formulas adopted by the *Wallace* and *Daley* decisions reveals that the Maine and Michigan courts have turned toward what is basically a negligence liability formula—*i.e.*, duty, breach of duty, proximate causation, and injury.[66] In determining when an act becomes negligent, it has been explained that "[t]he risk reasonably to be perceived defines the duty to be obeyed . . . ."[67] However, the scope of duty in the emotional distress field has not been clearly defined. It has been explained that ". . . the retreat from the 'impact rule' has been marked by rear-guard actions in which other mechanical rules have cut off duty short of the full range of the reasonably foreseeable."[68] The contribution of the *Wallace* and *Daley* decisions to the development of a rational liability formula for the negligent infliction of mental distress can be analyzed by comparing the degree that they conform to a pure negligence formula while being complimented by practical standards to the extent they adopt mechanical tests.[69]

"FEAR OF IMPACT" AND "ZONE OF DANGER"

Two of the limitations which remain despite the abolition of the impact rule are the "fear of impact" and "physical zone-of-danger" concepts.

The "fear of impact" limitation, first expressed in the dictum of

---

(dictum), wherein the court recognized that: "Many courts have held that there may be a recovery for the physical consequences of mental injury due to fright occasioned by the negligent act of the defendant."

66. The Supreme Judicial Court of Maine stated: ". . . we adopt the rule that in those cases where it is established by a fair preponderance of the evidence there is a proximate causal relationship between an act of negligence and reasonably forseeable mental and emotional suffering by a reasonably forseeable plaintiff, such proven damages are compensable even though there is no discernable trauma from external causes." Wallace v. Coca-Cola Bottling Plants, Inc., *supra* note 34, at —, 269 A.2d at 121. The Supreme Court of Michigan held that ". . . where a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff in a properly pleaded and proved action may recover damages for such physical consequences to himself not withstanding the absence of any physical impact upon plaintiff at the time of the mental shock." Daley v. LaCroix, *supra* note 1, at —, 179 N.W.2d at 395.

67. Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

68. 2 HARPER AND JAMES, *supra* note 4, at 1036.

69. It is interesting that in many of the cases of first impression, the courts which adopted the "impact rule" talked in terms of foreseeability and proximate causation, but then adopted the mechanical "impact rule." *See, e.g.*, Braun v. Craven, *supra* note 13. It has been pointed out that in ten of thirteen cases of first impression, re-

Justice Kennedy in *Dulieu v. White & Sons*,[70] has been accepted by the *Restatement of Torts*,[71] and by numerous case decisions.[72] Basically, this doctrine limits recovery for mental distress to situations where the negligence of the defendant places the plaintiff in fear of immediate personal physical injury. Despite its widespread acceptance, the rule has been characterized as one of the arbitrary limitations which are defined as

> encrustations on the legal liability formula, not logical limitations derived from its basic terms. They are artificial rules intended to limit liability or to simplify administration of legal doctrine. They are not specific projections of more persuasive tort principles.[73]

The English courts have rejected the "fear of impact" doctrine,[74] and a number of the American courts have discarded it.[75] The requirement is an inadequate test for situations such as *Wallace*, where the distress is not really from the fear of impact but rather nausea develops from the discovery that one's food is contaminated.[76]

Another argument against the "fear of impact" limitation is that ". . . conduct which foreseeably threatens physical harm from bodily impact does not necessarily threaten physical harm from emotional disturbance

---

covery would not have been allowed if a pure negligence approach had been used, and that the courts went further than necessary by adopting the "impact rule." 1936 N.Y. LAW REVISION COMMISSION, *supra* note 40, at 396-406. *See*, e.g., Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899), *overruled* Daley v. LaCroix, *supra* note 1.

70. *Supra* note 11, at 675, wherein the court explained: "The shock in order to give one a cause of action, must be one which arises from a reasonable fear of immediate personal injury to oneself."

71. "If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from internal operation of fright or other emotional disturbance does not protect the actor from liability." RESTATEMENT (SECOND) OF TORTS § 436(2) (1965).

72. *See, e.g.*, Orlo v. Connecticut Co., *supra* note 34, at 239, 21 A.2d at 405; Robb v. Pennsylvania R.R., *supra* note 34, at —, 210 A.2d at 714-15; Falzone v. Busch, *supra* note 36, at 569, 214 A.2d at 17; Niederman v. Brodsky, *supra* note 15, at 413, 261 A.2d at 90; Savard v. Cody Chevrolet, Inc., *supra* note 35, at 410, 234 A.2d at 660.

73. Smith, *supra* note 5, at 235.

74. Hambrook v. Stokes Brothers, [1925] 1 K.B. 141.

75. *See* Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674 (1937), *aff'd on rehearing*, 135 Neb. 232, 280 N.W. 890 (1938) [Noted in Annot., 122 A.L.R. 1468 (1939)]; Frazee v. Western Dairy Products, 182 Wash. 578, 47 P.2d 1037 (1935). *Cf.* Hill v. Kimball, *supra* note 14; Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924).

76. *See* Smith, *supra* note 5, at 239. For an illustration of the diverse approaches to the contaminated drink cases, *compare* Wallace v. Coca-Cola Bottling Plants Inc., *supra* note 34, *and* Kenny v. Wong Len, 81 N.H. 427, 128 A. 343 (1925) *with* Cushing Coca-Cola Bottling Co. v. Francis, 206 Okla. 553, 245 P.2d 84 (1952).

without bodily impact."[77] An example of this is found in *Williamson v. Bennett*,[78] where the defendant, driving a small sports car, lightly hit the side of the plaintiff's automobile. Although the plaintiff heard the sound of the collision, it was so quiet that she thought a child had ridden a bicycle into the side of her car. While the plaintiff suffered severe emotional distress, it was due to her own pre-existing susceptibility,[79] and was not a normal reaction to the collision. Here the court properly denied recovery, since the conduct which threatened physical harm did not threaten severe emotional disturbance.

The "physical zone-of-danger" limitation is a logical extension of the "fear of impact" requirement. This doctrine restricts the scope of liability for negligently inflicted mental distress to persons within the range of physical danger.[80] The test is usually applied to deny recovery for emotional distress in the bystander cases, where an individual witnesses an injury to another. For example, in *Guilmette v. Alexander*[81] a mother standing on her front porch witnessed an accident on the street in front of her home. Her daughter had just stepped out of a school bus when the defendant, while negligently driving his automobile, hit the five year old daughter. The mother was not allowed to recover for her severe emotional distress, because the court would not extend the scope of legal duty beyond the zone of danger.[82] The "zone-of-danger" limitation has also been classified as arbitrary and mechanical, since it obscures the real question of whether one may recover for the emotional distress caused by witnessing an injury negligently inflicted upon another.[83] Despite this criticism, the limitation has been almost universally accepted.[84]

---

77. 2 HARPER AND JAMES, *supra* note 4, at 1038.

78. 251 N.C. 498, 112 S.E.2d 48 (1960).

79. For a discussion of the problem of the hypersensitive plaintiff, *see* text accompanying note 91 *infra*.

80. *See generally* Brody, *supra* note 55, at 238-39; Goodhart, *The Shock Cases and Area of Risk*, 16 MO. L. REV. 14 (1953); Comment, *Emotional Distress Negligently Inflicted Upon Spectator Plaintiff—A Suggested Model for Indentifying Protected Plaintiffs Based on Relational Interest*, 1969 UTAH L. REV. 396 (1969).

81. — Vt. —, 259 A.2d 12 (1969).

82. *Id.* at —, 259 A.2d at 14.

83. Brody, *supra* note 55, at 236. *See* Dillon v. Legg, 68 Cal. 2d 728, 746, 69 Cal. Rptr. 72,84, 441 P.2d 912, 924 (1968) [Noted in Annot., 29 A.L.R.3d 1316 (1968)]; Goodhart, *supra* note 80, at 23-24; Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512 (1968) [hereinafter called *Reappraisal*].

84. *See, e.g.*, Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Cleveland, C., C. & St. L. R.R. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900); Mahoney v. Dankwart, *supra* note 24; Wyman v. Leavitt, 71 Me. 227 (1880); Hyatt v. Adams, 16 Mich. 180 (1867); Jelley v. LaFlame, 108 N.H. 471, 238 A.2d 728

To eliminate the use of these mechanical limitations, many legal scholars have advocated a negligence liability formula. This liability formula measures the scope of duty by determining whether the prudent actor could have reasonably foreseen that his conduct created a substantial risk of producing serious emotional harm to the average person.[85]

Through a footnote,[86] the *Daley* decision indicates that it follows the Restatement view, which requires that the negligent conduct create an unreasonable risk of bodily harm,[87] but the holding itself does not require it.[88] The *Wallace* decision does not mention any requirement of fear of impact, but does require a ". . . proximate causal relationship between an act of negligence and reasonably foreseeable mental and emotional suffering by a reasonably foreseeable plaintiff . . . ."[89] This formula is flexible and free of artificial limitations. It is very close to the above-mentioned formula advocated by the legal scholars, and is adaptable to situations where a mother witnesses the negligent injury inflicted upon her child.[90]

PERSONS OF UNUSUAL SUSCEPTIBILITY

Another limitation which remains despite the abolition of the impact rule is the rule that "[a]bsent specific knowledge of plaintiff's unusual sensitivity, there should be no recovery for hypersensitive mental disturbance where a normal individual would not be affected under the circum-

(1968); Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935) [Noted in Annot., 98 A.L.R. 394 (1935)]. *See generally*, Annot., 29 A.L.R.3d 1337 (1970); Annot., 18 A.L.R. 2d 216 (1951); 38 AM. JUR. 2d *Fright, Shock, and Mental Disturbance* § 36 (1968). *Contra* Dillon v. Legg, *supra* note 83. *See* Owens v. Liverpool Corp., [1939] 1 K.B. 394. Note that liability may exist if the act witnessed was an intentional or willful act. *See, e.g.*, Rogers v. Williard, *supra* note 44; Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Hill v. Kimball, *supra* note 14; Jeppsen v. Jensen, 47 Utah 536, 155 P. 429 (1916); Lambert v. Brewster, *supra* note 75. *But see* McGee v. Vanover, 148 Ky. 737, 147 S.W. 742 (1912).

85. *See, e.g.*, 2 HARPER AND JAMES, *supra* note 4, at 1039; Brody, *supra* note 55, at 244; Goodhart, *supra* note 80, at 23-24; Havard, *supra* note 33, at 494; Smith, *supra* note 5, at 303; *Reappraisal, supra* note 83, at 528.

86. Daley v. LaCroix, *supra* note 1, at —, 179 N.W.2d. at 395, n.13.

87. RESTATEMENT (SECOND) OF TORTS § 436 (2) (1965).

88. Daley v. LaCroix, *supra* note 1, at —, 179 N.W.2d at 395.

89. Wallace v. Coca-Cola Bottling Plants Inc., *supra* note 34, at —, 269 A.2d at 121.

90. *See* Dillon v. Legg, *supra* note 83. *But see* Tobin v. Grossman, *supra* note 84, in which the Court of Appeals of New York would not extend liability to a mother witnessing injury to her child, basically on public policy grounds, despite the flexible liability formula established in Battalla v. State of New York, *supra* note 18.

stances."[91] This limitation on the scope of duty is illustrated in *Kaufman v. Miller*,[92] where the defendant negligently drove her automobile into a truck-trailer driven by the plaintiff. The collision was so minor that the plaintiff thought he had brushed the curb of a bridge, yet when he discovered there had been an accident, he became nervous. Over a period of months the plaintiff had dizzy spells, was briefly hospitalized, and was mentally unable to drive a truck. The testimony of a psychiatrist revealed that the plaintiff had a pre-existing neurosis, due in part to a prior accident which had left him with guilt feelings. The subsequent accident with the defendant triggered a conversion reaction, essentially because the plaintiff realized he might have caused injury without being aware of it, and thus unable to prevent it. In view of plaintiff's pre-existing susceptibility to a conversion reaction, the Supreme Court of Texas held that as a matter of law ". . . the defendant could not reasonably have foreseen the injuries suffered by the plaintiff as a natural and probable consequence of her negligent conduct."[93]

Restricting liability for emotional distress to negligent conduct which would affect the person of normal sensibility has not been classified as a mechanical limitation, but a logical restriction compatible with a foreseeability-proximate causation formula.[94] Using the appropriate standard to define mental disturbance,[95] and scientific criteria of proof,[96] it is appropriate for the jury to determine whether the defendant's conduct would have caused serious mental distress in the normal person in the plaintiff's position.[97] To do otherwise would create too great a burden upon the individual in his everyday affairs. *Daley*, by explicitly adopting this restriction,[98] and *Wallace*, by implicitly requiring it,[99] have not constructed a mechanical prerequisite to liability.

---

91. Daley v. LaCroix, *supra* note 1, at —, 179 N.W.2d at 395.

92. 414 S.W.2d 164 (Tex. 1967).

93. *Id.* at 170.

94. *See* Spade v. Lynn & Boston R.R., *supra* note 28, at 289, 47 N.E. at 89; Purcell v. St. Paul City R.R., *supra* note 14, at 139, 50 N.W. at 1035; 2 HARPER AND JAMES, *supra* note 4, at 1035; Smith, *supra* note 5, at 256; *Reappraisal, supra* note 83, at 518.

95. Mental disturbance which does not qualify for compensation would include mere upset, dismay, humiliation or anger. It has been suggested that the harm necessary is that ". . . mental distress serious enough to require medical attention." *Reappraisal, supra* note 83, at 517.

96. *See* Smith, *supra* note 5, at 285.

97. Brody, *supra* note 55, at 256; Smith, *supra* note 5, at 242; *Reappraisal, supra* note 83, at 518.

98. Daley v. LaCroix, *supra* note 1, at —, 179 N.W.2d at 395.

99. The limitation is inherent in the statement that there be ". . . reasonably for-

THE NEED FOR A PHYSICAL CONSEQUENCE

Despite the abolition of the impact rule, a well settled rule is that there can be no recovery for fright alone when the offending act is simple negligence.[100] This is basically a policy decision, but it is rationalized on the concept that emotions such as "upset," "dismay," and "anger" are trivial, and to require people to avoid inflicting such reactions would be unreasonable.[101] When emotional distress is caused through an act of negligence, recovery can only be had if there is a physical consequence which is the natural and probable result of the fright.[102] The definition of a "physical consequence" will often determine whether or not there will be liability. While nervous shock has been held to be a physical injury,[103] in *Espinosa v. Beverly Hospital*[104] the plaintiff was not allowed to recover for the shock to her nervous system which occurred when the defendant hospital negligently gave her the wrong baby, because mental suffering and loss of sleep was not deemed to be a physical consequence.[105]

A comparison of the *Wallace* and *Daley* decisions indicates the *Wallace* decision is more liberal, since it allows the plaintiff to recover for the mental and emotional suffering negligently inflicted by another provided that it is "substantial and manifested by objective symptomatology,"[106] while *Daley* requires a "definite and objective physical injury."[107] By focusing on the physical consequence, the *Daley* decision is more compatible with the previous decisions allowing recovery for negligently inflicted emotional distress. The cause of action is viewed as one for personal injury, with the emotional distress merely being a link in the chain of causation between the act of negligence and the physical injury.[108] It has been explained that:

---

seeable mental and emotional suffering by a reasonably forseeable plaintiff. . . ." Wallace v. Coca-Cola Bottling Plants Inc., *supra* note 34, at —, 269 A.2d at 121.

100. *See generally* Petition of United States, *supra* note 53, at 268; Annot., 64 A.L.R.2d 100, 117 (1959); PROSSER, *supra* note 43, at 348. *But see* Clegg v. Hardware Mutual Casualty Co., 264 F.2d 152 (5th Cir. 1963).

101. *See Reappraisal, supra* note 79, at 517.

102. *See, e.g.*, Orlo v. Connecticut Co., *supra* note 34, at 239, 21 A.2d at 405; Whitsel v. Watts, 98 Kan. 508, 510, 159 P. 401, 402 (1916); Purcell v. St. Paul City R.R., *supra* note 14, at 134, 50 N.W. at 1034.

103. *See, e.g.*, Sloane v. Southern California Ry., 111 Cal. 668, 680, 44 P. 320, 322-23 (1896); Kimberly v. Howland, 143 N.C. 398, 403-04, 55 S.E. 778, 780 (1906).

104. 114 Cal. App. 2d 232, 249 P.2d 843 (1952).

105. *Id.* at 235, 249 P.2d at 844.

106. Wallace v. Coca-Cola Bottling Plants Inc., *supra* note 34, at —, 269 A.2d at 121.

107. Daley v. LaCroix, *supra* note 1, at —, 179 N.W.2d at 395.

108. *See, e.g.*, Chiuchiolo v. New England Wholesale Tailors, *supra* note 19, at

> The plaintiff is complaining of a bodily injury, of the invasion of an interest zealously protected by the law. The defendant has negligently endangered the plaintiff's bodily safety by conduct which might have caused an injurious physical impact. Hence, the only question is whether . . . it is expedient to allow the plaintiff to trace the causal connection through a psychic link in the chain of causation.[109]

By focusing on the emotional disturbance, the *Wallace* decision represents the trend toward increased protection of the mind and emotions.

A further comparison reveals that while *Daley* suggests a need for expert testimony,[110] *Wallace* allowed the plaintiff to recover based upon the judgment of the jury predicated upon simply their "ordinary knowledge from everyday experience."[111] This delegation of responsibility to the jury focuses on the problem involved in the emotional distress area, as seen by several legal writers.[112] It has been explained that by the use of mechanical rules, such as the "impact rule," "fear of impact" rule, and "zone-of-danger" rule, the courts have upset the division of responsibility between the court and jury. Little is left for the jury to decide when applying rules based on a policy decision rather than principles of tort liability.[113] The suggested alternative is the application of the usual standards of proximate causation and foreseeability, first by the jury, then subject to the judicial review of the court.[114]

CONCLUSION

The *Wallace* and *Daley* decisions represent the continuing growth in the mental distress field. Both decisions have discarded the impact rule, which has been considered an arbitrary standard. The abolition of this rule means there will be a greater uniformity of rights, and the duty of an individual will be measured by a more appropriate standard. The act of discarding the impact rule is, by itself, enough to provide Maine and Michigan with a more rational liability formula for the negligent infliction of mental distress. However, the Maine decision appears to go even further, because *Wallace* places a greater emphasis on emotional suffer-

---

334, 150 A. at 543; Pankopf v. Hinkley, 141 Wis. 146, 149, 123 N.W. 625, 627 (1909); Lambert, *supra* note 36, at 599. The rule, as phrased by the American Law Institute embodies this idea. RESTATEMENT (SECOND) OF TORTS § 436(2) (1965).

109. Magruder, *supra* note 42, at 1036.

110. Daley v. LaCroix, *supra* note 1, at —, 179 N.W.2d at 395.

111. Wallace v. Coca-Cola Bottling Plants Inc., *supra* note 34, at —, 269 A.2d at 122.

112. Brody, *supra* note 55, at 243. *See, Reappraisal, supra* note 83, at 528. *Cf.* Smith, *supra* note 5, at 302-06.

113. Note, however, that even proximate causation has been admitted to be a policy decision. Smith, *supra* note 5, at 272.

114. Brody, *supra* note 55, at 244.

ing. By focusing on the foreseeability of substantial mental suffering, the *Wallace* formula is adaptable to the bystander situations. Maine could, for example, follow the recent California decision[115] and grant recovery to a mother who has witnessed her child being run over due to the negligent driving of another. Whether Maine will take this next logical step and impose liability for negligently inflicted distress to a bystander remains to be seen.

Ronald G. Silbert

115. Dillon v. Legg, *supra* note 83.

APPENDIX

The following jurisdictions do not require an "impact" as a prerequisite to recovery for the negligent infliction of mental distress: *Federal*: Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955), *cert. denied,* 350 U.S. 947 (1956); *Alabama*: Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); *California*: Sloane v. Southern California Ry., 111 Cal. 668, 44 P. 320 (1896); *Colorado*: *Cf.* Hopper v. United States, 244 F. Supp. 314 (D. Colo. 1965); *Connecticut*: Orlo v. Connecticut Co., 128 Conn. 231, 21 A. 2d 402 (1941); *Delaware*: Robb Pennsylvania R.R., — Del. —, 210 A.2d 709 (1965); *Georgia*: Usry v. Small, 103 Ga. App. 144, 118 S.E.2d 719 (1961); *Kansas*: Whitsel v. Watts, 98 Kan. 508, 159 P. 401 (1916) (Dictum); Clemm v. Atchison, T. & S.F. Ry., 126 Kan. 181, 268 P. 103 (1928) (Dead Body); *Louisiana*: Laird v. Natchitoches Oil Mill, 10 La. App. 191, 120 So. 692 (1929); *Maine*: Wallace v. Coca-Cola Bottling Plants, Inc., — Me. —, 269 A.2d 117 (1970); *Maryland*: Green v. T.A. Shoemaker & Co., 111 Md. 69, 73 A. 688 (1909); *Michigan*: Daley v. LaCroix, — Mich. —, 179 N.W.2d 390 (1970); *Minnesota*: Purcell v. St. Paul City R.R., 48 Minn. 134, 50 N.W. 1034 (1892); *Montana*: Cashin v. Northern Pac. R.R., 96 Mont. 92, 28 P.2d 862 (1934); *Nebraska*: Hanford v. Omaha & C.B. St. R.R., 113 Neb. 423, 203 N.W. 643 (1925) [Noted in Annot., 40 A.L.R. 970 (1925)]; *New Hampshire*: Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930); *New Jersey*: Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); *New York*: Battalla v. Sate, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); *North Carolina*: Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906); *Ohio*: *See* Held v. Red Malcuit, Inc., 41 Ohio Op. 2d 210, 230 N.E.2d 674 (C.P. 1967); *Oklahoma*: Belt v. St. Louis-San Francisco Ry., 195 F.2d 241 (10th Cir. 1952); *Oregon*: Salmi v. Columbia, & N. River R.R., 75 Ore. 200, 146 P. 819 (1915); *Pennsylvania*: Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); *Rhode Island*: Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202 (1907); *South Carolina*: Mack v. South Bound R.R., 52 S.C. 323, 29 S.E. 905 (1898); *South Dakota*: Sternhagen v. Kozel, 40 S.D. 396, 167 N.W. 398 (1918); *Tennessee*: Memphis Street R.R. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917); *Texas*: Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890); *Vermont*: Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 234 A.2d 656 (1967); *Virginia*: *See* Penick v. Mirro, 189 F. Supp. 947 (E.D. Va. 1960); *Washington*: Frazee v. Western Dairy Products, 182 Wash. 578, 47 P.2d 1037 (1935); *West Virginia*: Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924); *Wisconsin*: Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957) [Noted in Annot., 64 A.L.R.2d 95 (1959)].